United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

Date: September 30, 1997

Case No. 96 INA 164

In the Matter of:

TEDDY & MICHAEL SILVERMAN,
Employer

on behalf of

ARACELY CASTILLO,
Alien

Appearance: H. P. McGarry, Esq., of Los Angeles, California

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ARACELY CASTILLO (Alien) by TEDDY & MICHAEL SILVERMAN (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at San Francisco, California, denied this application, the applicants requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General (1) that there are not sufficient workers who are able, willing, qualified, and available at the time and place where the alien is to perform such labor; and (2) that the employment of the alien will not adversely affect the wages and

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

working conditions of the U. S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability.[2]

STATEMENT OF THE CASE

On February 15, 1991, the Employer applied for labor certification on behalf of the Alien to fill the position of "Child Monitor." Employer offered $310 a week plus time and a half for overtime, if necessary for this forty hour a week position. The job had no educational requirement, but did require three months of experience in the job offered. The Job to be Performed was described as follows:

> renders care to 2 children ages 3 yrs and 8 mos. Boys ( ) girls (x). Keeps their quarters clean. Supervises their activities cares for them while adults are out. Meal prep for fam. of 4. Cleans houses while children are sleeping. NOn-smoking/drinking drg work- (no drugs) written ver. refs-

AF 44. The Alien asserted that she was not working for the employer at the time of application, but she had previously worked as a housekeeper/child monitor for another employer in Los Angeles from 1986-1988. AF 84-85.

Notice of Findings. The first Notice of Findings (NOF), which was issued by the Certifying Officer (CO) on September 9, 1995, advised that, subject to rebuttal, certification would be denied on grounds that the Employer failed to advertise the job opening as required under 20 CFR §§ 656.21(b)(1) and 656.21(g). AF 40. As the advertisements of February 1992 appeared at AF 75-77 and five referrals were received from qualified U. S. workers, it appears that the defect indicated in the record is that the Employer failed to interview these applicants and later requested an opportunity to readvertise the position. AF 40-73. Noting the Employer's reasons for failing to advertise, the CO directed the Employer to follow appropriate procedures to correct this defect when the Employer became able to do so. AF 40-41.

A second NOF was issued on February 5, 1993, in which the Employer was told that labor certification would be denied, subject to rebuttal, on grounds that the Employer failed to

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

readvertise the job opening, as directed by the first NOF. While the job was advertised on in October 1992, the CO said Employer failed to place a job order with the local employment service office, as required by 20 CFR § 656.23(d)(2). AF 12, 21-24. To rebut the Employer was referred to instructions in the previous NOF.

In addition, the CO found that the Employers job requirement of experience as both houseworker and cook was unduly restrictive in violation of 20 CFR § 656.21(b)(2)(i)(A). Employer was told to delete the restrictive requirements, or to either justify their business necessity or prove that they were common to this occupation in the United States, citing **Information Industries, Inc.**, 88 INA 082(Feb. 9, 1989). AF 12-13.

Finally, the CO found that five U. S. workers, Ms. Navarro, Ms. Thompson, Ms. Fandiala, Ms. Kane, and Ms. Mockler had applied for the job and were rejected by the Employer. As these candidates appeared qualified for the position, the Employer was told that it would be found that they were rejected for reasons that were neither lawful nor job related unless Employer rebutted with evidence of lawful reasons for their rejection, citing 20 CFR §§ 656.20(c) (8), 656.21.(b)(7), and 656.24(b)(2)(ii).[3] In addition, the CO said Employer's attempt to contact Ms. Mockler did not take place until nearly three weeks after receiving her resume, making the bona fides of her recruitment efforts a further issue. The Employer was directed to demonstrate that the facts asserting this delay were inaccurate. AF 13-143.

Rebuttal. Employer's rebuttal consisted of her letter and attachments of March 6, 1993, in which Employer offered an explanation for some of the issues and disputed some of the facts as to others. AF 07-10.

Final Determination. Alien labor certification was denied in the Final Determination, which the CO issued April 30, 1993. AF 04. In the Final Determination the CO said that as the Employer had failed to open a job order, the offered position of Child Monitor cannot be removed from the Schedule B list of non-certifiable occupations. The CO then found that the Employer failed to reduce the restrictive requirements nor justified them as a business necessity, but instead used them as the basis for rejecting U. S. job applicants for lack of experience as house-workers and cooks, both of which occupations are outside the scope of the duties of Child Monitor.

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[3] **Bobby McGee's**, 91 INA 039(Apr. 15, 1992); **Norm's Restaurant,** 89 INA 280(Dec. 19, 1990); **Creative Cabinets**, 89 INA 181(Jan. 24, 1990); **Naegle,** 88 INA 504; May 23, 1990); **H. C. LaMarche,** 87 INA 607(Oct. 27, 1988); **Leonardo's**, 87 INA 581(Nov. 20, 1987).

The CO said Employer rejected four of the five applicants on the basis of a restrictive job requirement and rejected the fifth for refusing an interview. As Employer failed to submit proof of her attempts to contact the U. S. applicants, she had not given valid job-related reasons for rejecting the U. S. workers seeking this position.

Appeal. On May 5, 1993, the Employer filed a request for review by the Board. AF 01.

DISCUSSION

Based on this record, as cited and examined above, the CO's denial of certification was supported by sufficient evidence. The Employer did not deny the inferences drawn, but simply explained why and how her efforts to recruit for the job became defective. She did not, however, present persuasive reasons for the restrictive job requirements that were the basis for her refusal to hire any of the well qualified U. S. workers who sought the job and were interviewed and rejected.

Without relying on either of the other cogent reasons for denying certification, we find that the Employer did not establish the business necessity of her restrictive requirements. Consequently, we conclude that the CO properly denied alien labor certification under the Act and regulations.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, type-written pages. Upon the granting of the petition the Board may order briefs.

Sheila Smith, Legal Technician

BALCA VOTE SHEET

Case No. 96 INA 164

TEDDI & MICHAEL SILVERMAN, Employer
ARACELY CASTILLO, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: September 25, 1997.